*United States Court of Appeals*

*for the Second Circuit*

# APPELLANT'S BRIEF

ORIGINAL 74-2542

# United States Court of Appeals

**For the Second Circuit**

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Chris-Craft Industries, Inc.,

*Plaintiff-Appellant-Cross-Appellee,*

*against*

Piper Aircraft Corporation, Howard Piper, Thomas F. Piper, William T. Piper, Jr., Bangor Punta Corporation, Nicolas M. Salgo, David W. Wallace and The First Boston Corporation,

*Defendants-Appellees-Cross-Appellants.*

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**Appeal from a Judgment of the United States District Court for the Southern District of New York**

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## BRIEF OF PLAINTIFF-APPELLANT CHRIS-CRAFT INDUSTRIES, INC.

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# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*Cases:*

***Statutes and Rules:***



***Miscellaneous:***

# United States Court of Appeals

**For the Second Circuit**

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**Docket No. 74-2542**

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CHRIS-CRAFT INDUSTRIES, INC.,

*Plaintiff-Appellant-Cross-Appellee,*

*against*

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE and THE FIRST BOSTON CORPORATION,

*Defendants-Appellees-Cross-Appellants.*

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**Appeal from a Judgment of the United States District Court for the Southern District of New York**

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## BRIEF OF PLAINTIFF-APPELLANT CHRIS-CRAFT INDUSTRIES, INC.

This is an appeal by plaintiff Chris-Craft Industries, Inc. ("CC"), from a judgment of the District Court for the Southern District of New York (Pollack, D.J.), on remand from this Court for the award of damages and injunctive relief.

### Preliminary Statement

This case is before this Court for the third time because the District Court refuses to follow the two prior opinions of this Court, 426 F.2d 569 *en banc* (1970) and 480 F.2d 341 (1973), *cert. denied,* 414 U.S. 910 (1973), and to award

CC damages and injunctive relief that will compensate it for its injury.

This action arises out of a contest for control of Piper Aircraft Corporation ("Piper") between CC and Bangor Punta Corporation ("BP"). BP won that contest by a narrow margin—51% to 42%—by acquiring the critical blocks (14½%) in a series of transactions condemned by this Court in its prior decisions. CC, which invested $44 million in the expectation of a fair contest, was thus deprived of an opportunity for control in a race in which it would have held a commanding lead in the absence of defendants' unlawful acquisitions. Instead, CC's large plurality position was reduced by defendants' violations to an illiquid permanent minority block subject to being taken by BP at any time via a merger. CC's carrying charges alone on the frozen minority position have exceeded $14,000,000 during the course of this litigation (EV 893).*

Despite this Court's original *en banc* opinion (426 F.2d 569),** the District Court on the first remand dismissed CC's complaint on the ground, *inter alia,* that sophisticated contestants for control are entitled to little, if any, protection under the securities laws (337 F. Supp. 1128) (1971) (Pollack, D.J.). Thereafter, this Court (Mansfield, Timbers, Gurfein, C.JJ.), reversed the District Court, reaffirming the *en banc* opinion and holding that CC was entitled to compensatory damages and an injunction preventing BP from voting its illegally-acquired stock for at least five years (480 F.2d 341). In view of defendants' repeated and serious violations, which also resulted in two actions

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* References preceded by "EV" are to the Exhibit Volumes; those followed by "A" refer to the Appendix on Appeal.

** On appeal from a denial of a preliminary injunction, the Court, *en banc,* found BP twice violated the securities laws in seeking control of Piper.

by the SEC, this Court directed the District Court to award relief which would not only compensate CC for its massive loss, but would be "bitter medicine" and of "didactic effect" (480 F.2d at 395, 406).

But, on the second remand, the District Court, we submit, defied the mandate:

— Although this Court emphasized that CC had been deprived of a fair opportunity to compete for control, the District Court concluded that control had no value and gave no weight whatsoever to the cost incurred by CC in assembling its block, or the price that BP paid for control.

— Although this Court recognized that CC was injured because its plurality position had been illegally converted into a huge illiquid minority block subject to being taken by BP by a merger at any time, the District Court rejected that holding and treated CC's 700,000 shares of Piper as if they were an anonymous 100-share block not subject to taking by merger.

— Although this Court ruled that BP should be deprived of the fruits of its illegal control by being enjoined from voting its 14½% contraband block for at least five years, the District Court fashioned injunctive remedies against CC and Piper that permit BP to retain *de facto* control of Piper during the five-year term.

Recognizing that this Court's two prior decisions required it to afford CC some relief, the District Court hypothesized, without any supporting expert opinion or other evidence, that CC had been injured by the amount of only \$2.40 per share. But the record shows that CC's loss was at least \$45 per share. The District Court thus made a token award of about 1/20th of CC's actual injury—

scarcely enough to cover the litigation expenses in shuttling back and forth between this Court and the lower court.

The District Court's award of nominal damages and ineffectual injunctive relief not only strips the Court's prior opinions of meaning, but also flouts other well-established legal and equitable principles. In effect, the District Court's decision, unless reversed, will be an open invitation for parties to violate the securities laws in control contests when the stakes are sufficiently high, for it has reduced the sanctions to a *de minimis* level.

## Issues Presented

The issues presented on this appeal are:

1. Did the District Court err in awarding CC only nominal damages by a methodology which, among other things:

(a) rejected "the broad remedial intent" of this Court's decision in favor of a "strict literal interpretation" of one phrase—"appraisal value";

(b) refused in valuing CC's minority holdings to take into account the cloud on value created by BP's power to compel a merger at any time;

(c) valued the minority position to which CC had been reduced as if CC held only a 100-share lot rather than nearly 700,000 shares, thus giving no consideration to illiquidity;

(d) refused, in determining the value of the position CC would have held in the absence of defendants' violations, to give any weight to either CC's cost, or the even higher price that BP paid in seeking control;

(e) assumed, contrary to this Court's holding, BP's own admissions, and all the objective evidence, that control of Piper had little, if any, value;

(f) resolved all uncertainties, both real and imaginary, in favor of the wrongdoers and against the victim?

2. Did the District Court err in limiting its injunction to the minimum term of five years and in imposing restraints upon Piper and CC that permit BP to retain effective control of Piper?

3. Did the District Court err in refusing to award CC the actual interest incurred on its frozen Piper investment and attorneys' fees?

4. Should this Court, on the record before it, and without a third remand, fix CC's damages and issue an injunction consistent with its prior opinion?

## Statement of Facts

### Summary of Background Facts

**The Violations.** In January 1969,* after purchasing more than 200,000 shares of Piper, CC made a cash tender offer for 300,000 or more shares at $65 per share (480 F.2d at 351). In reaction, the defendant Piper insiders told shareholders that this offer was "inadequate," even though Piper's financial counselor, defendant First Boston, had just advised it that $65 was fair, and Piper itself was then offering Grumman 300,000 shares at the same price. On the first remand, the District Court ruled that this conduct was acceptable (337 F. Supp. at 1135). This Court unanimously disagreed, stating "[t]he Piper family's culpability regarding these shareholder letters is clear" (480 F.2d at 364).

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* Unless otherwise indicated, this summary is taken from 480 F.2d at 349-55; and all dates refer to 1969.

Next, Piper's insiders issued a press release stating that Grumman had actually "agreed" to purchase 300,000 shares of Piper at $65 a share, although Grumman had merely received a free option to do so. The District Court, on the first remand, found no fault with the press release (337 F. Supp. at 1131, n.2, 1135). This Court unanimously reversed (480 F.2d at 365).

Although its tender offer was $12.50 above the market price, CC was able to obtain only 304,606 of the over 900,000 Piper shares then in the hands of public shareholders. This Court stated:

> "Considering the soundness of the offer and the materiality of the Piper family's deceptions, it is a reasonable presumption that CCI was unlawfully denied the opportunity to purchase additional shares. See Crane v. Westinghouse Air Brake Co., *supra,* 419 F. 2d at 797." 480 F.2d at 376-77.

After the close of the cash tender offer, CC held approximately 33% of Piper's stock and began preparing an exchange offer to Piper's shareholders to obtain majority control.

At this juncture, the Piper insiders joined forces with BP. In May, they exchanged their shares (31% of Piper) for a package of BP's securities valued at $70-$72 a share, and a commitment for a bonus, which would bring the value to $80 a share if BP gained majority control. Simultaneously, BP issued an illegal press release announcing that it intended to offer the other Piper shareholders "a package of [BP] securities to be valued in the judgment of The First Boston Corporation at not less than $80 per Piper share"* (329A).

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* This Court *en banc* held that this press release violated SEC Rule 135 and Section 5 of the Securities Act of 1933 (the "gun jumping" rules) (426 F.2d at 573-76). In May, BP and Piper consented to an injunction for this violation in a separate action brought by the SEC (480 F.2d at 353).

At this point, with CC leading 33% to 31%, both parties recognized that certain key Piper blocks (7½%) held by IOS and other large institutional investors could well determine the final outcome of the contest. But Rule 10b-6 precluded cash purchases of these important blocks while the BP and CC exchange offers were outstanding. CC complied with the law and refrained from purchasing these blocks even though their holders were favorably disposed to CC (1538A, 1826A, 1836A). But BP, ignoring warnings from the SEC and its own general counsel (378-81A, 1644-45A) defiantly purchased these pivotal blocks for cash in May, thus turning the tide in the contest and giving it a 38½% to 33% lead.

This Court, *en banc,* held that those cash purchases violated Rule 10b-6 (426 F.2d at 577). But the District Court, on the initial remand, dismissed those purchases as a harmless "technical violation" (337 F. Supp. at 1141-42). This Court unanimously reversed, reaffirming its *en banc* opinion. It held that BP's cash acquisitions violated Rule 10b-6 and were decisive in the battle for control:

> "Even arithmetically, it is apparent that the block purchases were . . . essential to achieve control. BPC's attainment of a majority position has caused CCI to suffer a decline in the value of its Piper holdings.
>
> "We hold that CCI is entitled to recover damages from BPC based on its violations of Rule 10b-6." 480 F.2d at 379.

Following its illegal cash purchases, BP made an exchange offer to Piper shareholders, in competition with CC's outstanding exchange offer, by a misleading prospectus that overstated the value of BP's railroad subsidiary (BAR) by $13 million (480 F.2d at 367-69). The District Court held that CC had no right to complain about this material misrepresentation by a competing offeror (337

F. Supp. at 1138). Again, this Court unanimously reversed, stating:

> "[W]e presume that the Piper shareholders would not have accepted the BPC exchange offer but for [these] misrepresentations . . . . [I]t is clear that the 7% acquired through [BP's] exchange offer was critical to its success." 480 F.2d at 375.

**The Critical Effect of the Violations.** BP acquired 14½% of Piper by the illegal cash purchases in May and by its misleading prospectus in August. This gave BP a commanding 45% to 41% lead in August.

In the absence of BP's illegal acquisitions of 14½% of Piper stock, CC would have led by a margin of 41% to 31% at the end of the exchange offers in August. Indeed, CC would have had an even larger lead. Since CC's exchange offer attracted more Piper stock than BP's misleading offer, CC clearly would have obtained some, if not most, of the Piper shares tendered to BP if the truth about BAR had not been suppressed. Moreover, after the close of the exchange offers, CC would have had the edge in attracting the 7½% key blocks preempted by BP's illegal cash purchases since their holders were "emotionally committed to CC" (1836A).

Assuming, on a conservative basis, that CC had led by only 41% to 31% at the conclusion of the competing exchange offers in August, the experts all agreed that CC's lead would have been virtually insurmountable (2430-31A, 2629-30A, 2722A, 3020A). Defendants' principal expert, Donald Gant, described CC's advantage as "formidable" (2876A). Just how "formidable" was illustrated by an unchallenged statistical presentation by plaintiff showing that at a 41% to 31% lead CC's chances of winning con-

trol would have been better than 99% (EV 831).* At the close of the exchange offer, CC, whose financial position had materially improved since January, had more than $14 million cash and more than $10 million in borrowing capacity to acquire the approximately 145,000 shares needed to give it majority control.** (*See* p. 24 *infra*). Even without borrowing, CC could have spent $100 a share in cash to acquire this stock, and its average cost for the 50% of Piper would still have been below $70 a share (3025-26A, EV 1110). In short, CC had victory within its grasp if defendants had played by the rules of the game.

But the actual situation was quite the reverse. Because of defendants' illegal acquisitions, instead of trailing 41%-31%, BP led 45%-41% at the end of the competing exchange offers in August. This made all the difference. BP now had a 99% likelihood of winning (2431A), and had to buy only 1 share for every 2 that CC needed to obtain a majority. Now it was BP that could pay the sky for control—and did. Even after CC stopped buying stock in August because of BP's insurmountable lead, BP went on to spend an additional $7 million in cash (paying as high as $84

* The same odds apply to a 42% to 37% lead, the spread that defendants use when they give BP credit for its purchases after their violations forced CC to drop out of the buying contest, in early August (2430A). Standard tort law requires that damage be measured as of the time of the consummation of the wrongful conduct. BP's fraudulent exchange offer was consummated in early August; at that time, CC's lead would have been 41%-31% absent defendants' illegal acquisitions. *See, e.g., Restatement (Second) of Torts* §910 and Comment (b) (Tent. Draft No. 19, 1973); *Esplin* v. *Hirschi*, 402 F.2d 94, 104-05 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

** The District Court's statement that CC "had run out of money" in "early February 1969" (2331A) was rejected by this Court (480 F.2d at 376). In any case, it does not reflect the undisputed facts in the record as to CC's cash position in August 1969 or its ability to borrow at that time if it led 41%-31% (3086-88A, 3094-95A, 3105A, 3112A, EV 1111-14).

a share) to raise its holdings to 50% by September 5 (478-80A). In so doing, it also incurred a $13 million liability to the Piper family for the control bonus under the May 8 agreement (480 F.2d at 366, n.19).

Control was worth the price, and BP, which made the acquisition "with open eyes" (337 F. Supp. at 1153, 1149; 2967-68A), proclaimed that the attainment of control was one of the most favorable events in its history (2964-65A).

**BP's Control of Piper.** Since 1969, BP has had full control of Piper (EV 1089, 1094), installing officers over CC's objection (2977A, 2989A), manipulating the size of Piper's Board at will,* cutting off dividends over CC's protest (EV 1320), and treating Piper as another division (EV 1054, 1097). In anticipation of the trial on relief BP became somewhat less autocratic (2986-87A); still, it did not hesitate in September 1973, even after this Court's decision, to make the head of its gun division the President of Piper—over CC's objection (2829A, EV 1420-24).

In sum, the District Court was clearly correct when it found at the trial on the merits that "CC did not then [in February 1969] or thereafter exercise any controlling influence in Piper" (337 F. Supp. at 1153). And this Court also recognized that "Piper has come under the dominance of BPC, with many of its management positions being

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* BP initially gave CC 3 seats on an 8 member board (EV 1301-04); it then changed the size of Piper's Board to 9 (EV 1339-42), and then to 10 and offered CC only 3 seats (EV 1353-54); when CC objected, BP changed the number of seats back to 9 (EV 1359-60). BP finally fixed the number at 10 after CC agreed to accept 4 places, allowing BP to fill the other 6 seats (EV 1100-01, 1098-99).

assumed by BPC's officers. It has been operated that way for two or three years"* (480 F.2d at 379).

**Status of CC's Shares.** BP's illegal acquisitions boosted it into control and converted CC's 697,495 shares of Piper into a white elephant. All experts on both sides agreed that no third party would purchase CC's minority block (2435-36A, 2578-79A, 2633-34A, 3023A, EV 1244-46). A potential purchaser would not only be at the mercy of BP with respect to management and policy decisions, but he would be under the constant cloud of merger by BP at an uncertain future date of BP's choosing.

A purchaser would be forced either to accept a grab bag of BP securities in a merger or to litigate with BP in a statutory appraisal proceeding fraught with uncertainty, risk, delay and expense. By deferring a merger until the bottom of a business cycle in the highly-cyclical aviation business, BP could take the minority position from the purchaser at the lowest price (2528-29A, EV 884-85). Under these circumstances, as one expert testified, nobody would touch CC's minority block "with a 10-foot pole" (3023A). Indeed, CC vainly tried to interest at least 15 investors in its position (1542-43A, 3172-82A).

BP's experts' only suggestion for the liquidation of CC's minority position was a registered public offering (EV 1247), although none would commit his own firm to selling

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* At the time of the 1974 hearing on damages, the following BP officers and directors held these positions at Piper: Nicolas Salgo, BP's Chairman Emeritus, was Chairman of Piper's Board; David Wallace, BP's Chairman and President, was Chairman of Piper's Executive Committee; Dudly C. Phillips, BP's General Counsel, was Vice President and General Counsel of Piper; John J. Martin, BP's Associate Counsel, was Secretary of Piper (EV 1017, 1062). Of Piper's 10 directors, 5 were BP's employees and the sixth was William T. Piper, Jr., BP's ally, and a large stockholder in BP (EV 146).

such a pig-in-a-poke (2898A, 3368-69A). But the audited financial statements required for such an offering were not certified until May of 1970,* by which time the stock market had collapsed and a public offering was impossible.

In short, defendants' violations rendered CC's 697,495 share block of Piper, accumulated at a cost of $44,628,267 unsalable.** If CC could have sold, why would it have incurred over $14 million in interest charges in carrying an investment paying no dividends and offering no possibility of control? There was really only one buyer—BP. And recognizing the advantage of "treat[ing] with Chris Craft" after it attained majority control (1885-86A), and its power to trigger a merger at the bottom of a cycle, BP refused to help CC out of its illiquid Piper investment (1504-05A). BP relished the thought of CC's coming under pressure from its bankers because of its locked-in position (1900A, 3202A) and concluded, "Time appears to stand in Bangor's favor" (EV 507). After the decision below, BP's leverage is even greater.

**Court of Appeals' Second Opinion**

In remanding this case for appropriate relief, this Court stressed the dual nature of CC's injury: the deprivation of a fair opportunity for control and the burden of an illiquid block subject to being taken by BP by merger at any time.

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* The delay was occasioned by the need to determine a reserve because of a defect in a popular model (EV 1006-07). This, in turn, required extensive flight testing, which was not completed until the spring of 1970.

** On September 5, 1969, CC had 697,495 shares for which it had expended $38,295,238 in cash and $6,333,029 in securities (480 F.2d at 354-55). Its average cost per share was $64.

Although the parties had not briefed the issue of relief, this Court decided that the District Court required "specific guidance" in awarding CC:

> "compensatory damages for the decline in the value of the minority shareholder's interest with which it became encumbered as a result of competing against those who violated the securities laws." 480 F.2d at 376.

Thus, it remanded the case to the District Court with a mandate that it award "at least the following relief" to CC:

> "(1) *Damages*
>
> * * *
>
> "We have held that the unlawful conduct of the Piper family, of BPC and its named officers, and of First Boston and its named officers has caused financial loss to CCI for which it should be compensated. The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time. . . .
>
> "(2) *Equitable Relief*
>
> "We further hold that BPC should be denied the fruits of obtaining Piper shares illegally. We therefore direct that the district court include in its judgment an injunctive provision barring BPC from voting for a period of at least 5 years the Piper shares it obtained through the unlawful May cash purchases and those it obtained through its exchange offer.
>
> "While we believe that the foregoing relief should be sufficient, our direction that the two provisions indicated above should be included in the judgment to be entered on remand is not intended to foreclose the district court from fashioning such additional appropriate relief as it may find necessary to implement our

decision herein, after affording the parties an opportunity to be heard on the issue of relief." 480 F.2d at 379-80 (footnotes omitted).

**The Trial on Relief**

Following the denial of certiorari in October 1973, the trial on relief was held from April 22 to April 25, 1974. The experts submitted reports containing their opinions, conclusions and supporting materials.* The trial was relatively short, with a transcript of only 720 pages and 48 exhibits.

Each side interpreted this Court's mandate differently, adopted opposite theories of damage, and called experts to give testimony based on its own theory.** Thus, this was not a trial where experts gave conflicting opinions relying on the same factual premises. Rather, the experts proceeded on totally divergent hypothetical theories, like two ships passing in the night.

**Defendants' Witnesses.** Despite this Court's broad mandate for remedial relief and full compensatory damages, defendants postulated an abstract theory which by its terms inevitably had to lead to the preposterous conclusion that CC suffered no damage. In essence, defendants seized on a single phrase in one of the Court's three opinions—"appraisal value"—and argued this must have meant a Pennsylvania statutory appraisal, even though BP could not have compelled a merger had it not illegally obtained control. Defendants' statutory appraisal theory further equated CC to the owner of 100 shares (rather than 700,000) and assumed (a) that CC wanted to sell whether

* *See* EV 819, 876, 904, 1209, 1235. *See also* EV 1120, 1487.

** The District Court refused to accept the parties' own statements of their positions as contained in a jointly-proposed pre-trial order, saying,

"I will see what the proof is before I decide what the contentions should be or should have been" (2404A).

or not it won a fair race and (b) that BP had the power to merge whether or not it violated the law. In short, this bogus theory factored out any damages caused by BP's illegal seizure of control and the power to merge in a race in which CC would otherwise have held a lawful commanding lead. To fill in the numbers for this rigged hypothetical, defendants relied on three experts:

(1) *Aubrey B. Lank,* a Delaware lawyer, was given the assignment by defense counsel of valuing one share of Piper in a hypothetical Pennsylvania statutory appraisal as of September 5 (EV 1231). Since this theory assumed that CC was a dissenter whether it owned an overwhelming plurality or an impotent minority, damages were impossible.* Asked how he could assume that BP could have compelled a merger even if BP had lost the contest, Lank responded that that was his assignment from the defendants (2763-65A, 2792-93A).

Lank's assignment also ignores this Court's directive that CC's minority holdings be valued as though subject to taking by merger "at any time." Instead, he was told by defendants to assume that the merger was consummated on September 6 (2762-63A) and had been proposed on January 22, before BP was even in the picture (2781A).** It simply was not Lank's assignment—or within his competence—to determine the price at which CC's shares could have been sold on September 5, 1969 (2788-89A). His testimony is probative only of the fact that if defendants ask an expert to assume that there is no damage, he will testify there is no damage.

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* Lank's method would have yielded no damages even if CC had an absolute majority of Piper's shares (2792-94A).

** There were other major flaws in Lank's appraisal which were brought out on his cross-examination.

(2) *Donald R. Gant,* a partner of Goldman, Sachs & Co., was given the assignment by defense counsel to assume that CC had consummated a registered secondary offering of its Piper shares on September 5 (the day BP obtained its illegal control of Piper) whether or not BP held a majority at that time (EV 1236, 1247). He testified that such an offering on September 5 would have netted CC between $41.60 and $43.50 (2823A), which he later adjusted down by $1 because of Piper's product liability problems (2897A).

A public distribution would have splintered CC's block and left control to BP by default—even if BP had not made its illegal acquisitions (2833A, 2917A, 2922A). Thus, it is not surprising that Gant concluded that the public offering price would be the same whether CC was in a minority, plurality or even majority position (2833A). Gant conceded that no corporation would have assembled a plurality at a premium in order to dissipate it through a public offering (2918A). He presumed a public distribution of CC's plurality holding not because he would have recommended such a sale (2918A) but because he was told by defendants to express conclusions "based on the assumption they [CC] wanted to sell their position either before Bangor Punta had a majority or after" (2880A). Since Gant assumed that CC was a forced seller, no matter how formidable its lead, he necessarily concluded—as had Lank—that CC suffered no damages.

Gant's September 5 public offering was not even a correct measure of the value of CC's minority position, for it rested on other unfounded assumptions given him by defendants that CC could have had an instantaneous registered public offering on September 5, 1969, the day BP achieved a majority (2887A); that the audited financials

required for such an offering could have been prepared overnight (2827-28A); and that BP and Piper would have given CC the cooperation and disclosures necessary for a registration statement (2825-26A, 2831-32A).*

Since an instantaneous public offering on September 5 was not possible, Gant recognized that there was no way for CC to sell its minority block on September 5 (EV 1244-46).** A private placement would have been possible only if BP and Piper gave a commitment to register —which they were manifestly unwilling to do—and then only at a discount of 25% to 30% for CC's block (2831A), or $31 to $34 a share.

Having been asked only to price a public offering which would dissipate any control value, Gant expressed no opinion in his report or direct testimony on the value of control. Indeed, he was unfamiliar with the light aircraft industry in 1969 (2845A) and although he recognized that there were hundreds of reasons why control had value (2844A), he never inquired what value his client BP saw in Piper, or why, on the advice of First Boston, it was willing to pay $80 a share for control (2844A, 2881A, 2884A, 2909A, 1830A). Nevertheless, in an effort to seek support for its own views that control of Piper was worthless, the

* Moreover, Gant would not have committed his own firm to underwrite CC's shares unless BP cooperated by, *inter alia,* indicating in the registration statement its intentions concerning merger (2859-60A, 2862-65A). Not surprisingly, Gant would not have been content with the only statement that BP was in fact willing to make in its exchange offer prospectus and SEC filings—an ominous threat of merger with no definition of terms (EV 31, 2598-600A).

** On July 29, when CC recognized it could not overcome BP's unlawful lead, it asked BP and First Boston to cooperate in an underwriting of CC's block. Wallace flatly refused. Earlier First Boston refused to help finance BP, its own ally, at a time when BP's probability of winning was not yet certain (1504-05A).

District Court pressed Gant to give impromptu opinions on the subject (2924-25A). Without any fact or supporting analysis, Gant responded that he would have anticipated a premium for control of 20% to 30% above Piper's market price (2924A), but added that with an opposing block of 42%, a divided board, and lawsuits, he would not "know how to go about appraising" the value of control (2925A). He guessed it "might be 5 percent, 10 percent" above Piper's market price (2925A).*

(3) *Clifford L. Fitzgerald, Jr.*, a partner in Drexel Firestone, testified at the original trial in 1971—prior to this Court's mandate—that the market value of Piper in May 1969 was $55 a share in the absence of efforts by anyone to seek control (3297A, 3367A, EV 796). That assumption, of course, eliminates any value for control.** Fitzgerald was not prepared to say that either BP or CC overpaid for Piper shares in seeking the opportunity for control since that depended on their judgment in 1969 as to what could be realized out of control (3375-76A), a subject on which Fitzgerald made no inquiries.

* Gant made no effort to determine the value of control to CC, saying only that his "impression"—based on the views expressed in the dissenting appellate opinion concerning CC's resources in January 1969—was that CC was not in a financial condition to proceed to control from its plurality position (2878A, 2903A). If his premise as to CC's financial capacity was "wrong"—which it was shown to be (3086-87A, EV 1111-14)—"there may [have been] a different value" for CC's holdings (2903A). But he did not calculate this.

** The Court below stressed that it was impressed by Fitzgerald's testimony concerning the attributes of control (2370-71A). Fitzgerald testified that he did not analyze the value of control of Piper in 1969, and he limited his study to Piper as it existed in 1971 (3376A). Since BP's nominee had just become president of Piper in 1970, Fitzgerald said it was too early to decide whether CC could have done a better job if CC had obtained control (3329A, 3371-73A, 3376-77A). Fitzgerald also assumed that an accounting rule, not yet adopted at the time of the trial, would, if implemented in 1969, have enabled CC to report a pro rata share of Piper earnings in September 1969 (3326-28A, 3333A).

Fitzgerald did not determine the market value of Piper shares subsequent to May 1969. But he did make a separate, and irrelevant, computation of their September 1969 intrinsic value—an abstraction unrelated to market value (3366-67A). His intrinsic value of $42.10 as of September 5, 1969, was based on a projection—prepared by the BP-controlled Piper management—that Piper would earn $6 a share in 1973 (3350-52A). His computation was only "as good as" the self-serving 1973 earnings projection (3352A). Further, Fitzgerald conceded that CC's block was of "no institutional interest" (3341-42A); that his firm would not be willing to underwrite CC's Piper block even at his intrinsic value figure (3368-69A); and that he would recommend the block to a purchaser only if there were guarantees concerning the $6 a share projection (3369-70A).*

While Fitzgerald's testimony was reoffered at the damage trial, he was not called by defendants to the stand—and for good reason! Piper lost money in 1972, earned only $2.65 in 1973 and traded at $10-12 a share at the time of the damage hearing—$67 less than the value Fitzgerald estimated for 1973 (3301A). If, as Fitzgerald acknowledged, his September 1969 intrinsic value computation was merely "as good as" the $6 a share projection made by Piper on the eve of the first trial, it was not only irrelevant, but plainly fictitious.**

* I. W. Burnham, the senior partner of the investment banking house into which Drexel Firestone has been merged, testified for CC at the 1971 trial that his firm would not have underwritten a public offering of CC's minority block because of BP's overhanging power to merge (1149A, 3168-69A).

** At the first trial CC called as an expert Professor Douglas Bellemore of NYU. Since the lower court expressed doubts as to his credibility (337 F.Supp. at 1153, n.11), CC did not reoffer his testimony, even though his prediction of the market price of Piper closely corresponds with Piper's market performance since the first trial.

(4) *David W. Wallace,* BP's President, was called to describe his occasional consultation with CC about Piper's management, but his testimony was significant only for his silences and admissions. He offered no support for Gant's assumptions that BP would cooperate in a public offering of CC's 700,000 shares. He acknowledged the difficulty of determining a product liability reserve which delayed Piper's audited financials until May 1970 (2998-3003A). He did not deny that BP intended to merge CC out at a time most opportune to BP. And he did not claim that BP overpaid for control of Piper, as the District Court later found. On the contrary, Wallace testified that BP had made a careful evaluation of Piper before entering into the control contest (2933A, 2967-68A), and despite the cost, he believed BP had acted wisely in securing control (2968-69A). Significantly, despite BP's obvious interest in underplaying CC's damages, Wallace said he would not trade places with CC by selling it the 120,000 control shares (2995A).

**CC's Witnesses.** CC presented a very different case at the trial on relief. In conformity with this Court's opinions, it attempted to calculate the value of its 700,000 shares when it held a hypothetical 41%-31% lawful lead in the control contest and then to determine the reduction in the value of that block after defendants had unlawfully acquired control. This was an attempt to quantify the actual damages caused by the violations. Plaintiff's experts were:

(1) *Roger F. Murray,* S. Sloan Colt Professor of Banking and Finance at the Columbia University Graduate School of Business, who also has been the chief economist of Bankers Trust Co., the principal investment officer of a billion dollar pension fund, Chairman of the Investment Committee of Smith College, and a director of numerous

banks, mutual funds, and companies (2501-05A, EV 876). The District Court described his credentials as "magnificent" (2505A).*

Dr. Murray testified that absent BP's illegal acquisitions, CC's plurality holdings would have had a market value of at least $57 a share, and an intrinsic value to a conglomerate of $68 a share (EV 878, 2516-18A, 2534A); he said that a party seeking control would have been willing to pay CC a substantial premium above his estimated market price (2518A, 2569-74A). Control was particularly important at Piper because important decisions were pending "concerning marketing policies, product line, plant locations, executive leadership, etc." (2576-77A), a subject on which BP and CC had different views (2989-90A).

Dr. Murray testified that once BP gained control, CC was saddled with "an unmarketable minority position" (2521A). Apart from the illiquidity of CC's minority block, which was six times the size of Piper's float, BP's power to compel a merger at any time of its choosing further destroyed the value of CC's shares (2521A). BP as a rational business enterprise could be expected to merge with Piper at a time most advantageous to itself—the bottom of Piper's cycle when Piper shares and earnings were at their low (2521-22A, 2584-85A, 2590A). An investor's only recourse would be an appraisal proceeding, which Dr. Murray described as a "form of protection and comfort that I always hope, as an investor, I will never

* In this, the Court confirmed the opinion of Judge Gesell who concluded that Dr. Murray was "an extremely experienced, informed, sophisticated money manager." *Blankenship* v. *Boyle*, 337 F. Supp. 296, 300 (D.D.C. 1972).

have to rely on" (2601A; *see also* 2522-24A, 2587-88A)—a skepticism shared by the commentators.*

Speaking from his experience as manager of billion-dollar securities portfolios, Dr. Murray confirmed that CC's minority shares were of no interest to institutions since "it was impossible to tell whether one was buying shares in Piper, buying an unknown package of securities from Bangor Punta, or buying the right to bring an appraisal proceeding in the Pennsylvania courts" (2525A). For the same reason, he would have a low opinion of any investment banking firm that would peddle CC's Piper shares to customers (2578-81A). Taking into account all of the risks, Dr. Murray concluded that CC's permanent minority position had a value of $20 a share on September 5, 1969 (EV 883-85, 2524-25A).

(2) *Robert Rosenkranz,* a partner in Oppenheimer & Co., responsible for that firm's own investments, shared Dr. Murray's views about the unattractiveness of CC's large block to a third party or to the public on a secondary offering (2633-34A, EV 920-32). He said that Oppenheimer would not have been willing to serve as underwriter for CC's minority position since its customers "could wind up with a totally different package of securities and a different issuer [BP]" (2646A; *see also* 2678-79A). Therefore, applying several analytical techniques, he independently calculated the hypothetical value of CC's minority block as between $20 and $23 a share. In contrast, CC's plurality position would be readily marketable at $58 a share, if not at a premium (2621-30A). While he was not asked to determine the premium, he expressed the opinion that a com-

* *See, e.g.,* Vorenberg, *Exclusiveness of the Dissenting Stockholders' Appraisal Right,* 77 Harv. L. Rev. 1189, 1201-02 (1964); Manning, *Shareholder's Appraisal Remedy,* 72 Yale L. J. 223, 233 (1962).

manding plurality had a value of between $58 and $80 a share—"and probably a lot closer to $80 [the price that BP paid for control] than to $58" (2723A).

(3) *Sigmund Wahrsager,* a senior partner in Bear, Stearns & Co. and head of its corporate finance department, took a different approach. Based on a study of numerous tender offers, and considering the prices paid by the parties in this contest, he valued CC's plurality at $72 prior to BP's illegal seizure of control, because he concluded CC had a 99% chance of success if it had led 41%-31% or 42%-37% (EV 831, 2411A, 2430-33A). He agreed that CC's minority was "inherently unmarketable" as a block (2436A). Like Gant, he believed that the only method of liquidating the shares was by a public offering (EV 833-34), which would have required audited financials for Piper's year ended September 30, 1969 (2441A). But a public offering could have been consummated only if Piper's financials could have been completed by January 1970 (2442-43A), five months before they were ready (2441A). Even assuming the financials could have been ready by January 1970, Wahrsager, the only witness whose firm would have been willing to serve as an underwriter, observed that the issue would not have been like "vanilla ice cream" to sell (2458A); that sophisticated investors, such as trust departments, would not have been purchasers; and that the sale would have had to be accomplished as "strictly a retail distribution" with a generous commission to the broker (2449A). CC would have netted only $27 a share from a January offering (2453A)—a pricing computation which defendants offered no evidence to contradict.* By May

* Gant made no effort to compute a public offering price for a date subsequent to September 5. He admitted that since an offering price is computed on the day the registration statement becomes effective (2826A), his September 5 price would not be relevant to any other date (2830A, 2887A).

1970, when Piper's financials were ready, Wahrsager confirmed that a public offering of CC's shares would have been impossible (2455-56A). In fact, CC was locked in.

(4) *Steven J. Ross,* chairman and chief executive of Warner Communications, Inc., experienced in more than 30 acquisitions and responsible for the company's two hundred million dollar investment portfolio, was called on rebuttal.* He testified that control was worth a substantial premium; that CC's 41%-31% lead in a fair race would have been insurmountable; but that after BP's illegal seizure of control, nobody would have touched CC's 700,000 shares with a 10-foot pole (3023A).

(5) *Other Evidence.* Plaintiff also introduced financial statements showing that its financial condition had improved subsequent to January 1969 (EV 1111-14). It had more than $14 million cash in August which it could have used to purchase Piper stock in a fair race—facts confirmed by C. Leonard Gordon, CC's then general counsel and executive vice president (3086-87A). It also called Robert Henderson Potts, vice chairman and senior loan officer of the Philadelphia National Bank, in charge of a loan portfolio of $2.1 billion. Potts testified that CC would have been able to borrow an additional $10 million in August 1969 to acquire control of Piper if it had held a lawful lead in the absence of defendants' illegal acquisitions (3105A). He testified that a majority position, in contrast to minority holdings, is bankable and that he would have recommended such a loan to enable CC to gain control (3105A, 3110A).**

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* Contrary to the District Court's suggestion that notice of Ross's appearance was withheld (2348A, n.11), Ross was asked to testify after CC received defendants' experts' reports, the Friday before trial (3016-17A).

** Gordon also testified that CC's existing loan agreements would not prevent it from borrowing any funds necessary (3088A), a fact confirmed by Potts (3113A; *see also* 1082A).

In short, plaintiff's experts, using realistic assumptions, found that CC's frozen minority block, which had cost $64 a share to assemble, had been reduced to a value of $20 to $27 a share. In contrast, defendants' experts were assigned hypotheticals devised by defense counsel which, by their very terms, factored out the elements of defendants' misconduct, CC's loss of the opportunity for control and CC's encumbrance with an illiquid block—assumptions which necessarily produced zero damages.

## The Opinion Below

The District Court's opinion is difficult to summarize because it contains internally inconsistent theories and sudden shifts of position.

### Damages

At the outset, the District Court complained that this Court's opinions were unclear—"the words used are capable of a variety of interpretations and shadings" (2332A). As a result, the District Court stated that it faced "the difficult choice between following the strict literal meaning of the words and the broader remedial intent evidenced by the general thrust of the appellate decision" (2332-33A). Incredibly, it opted for the so-called "strict literal meaning," based on the single phrase "appraisal value." Expressing "perplexity in grasping [this Court's] concept and forging a rational method of application" (2332A), the District Court said that this Court "[f]or reasons best known to it," required that CC's shares be valued as if the lower court were conducting a statutory appraisal keyed to a September 5 merger (2338A).

Applying the "strict literal" interpretation, the District Court assumed that CC held "merely an anonymous 100-

share block'' rather than a huge illiquid block of 700,000 shares and that BP had the power to merge both before and after it illegally seized control (2343A). CC's block, in both its plurality and minority state, was thus valued at the same moment of time, September 5, as if it were no more than a dissenter's one hundred shares in a statutory appraisal proceeding. By definition, this approach, exemplified by defendants' witness Lank, yielded zero damages.

The District Court then searched the record for some indicia of the damages which had been stressed in three separate opinions by this Court. But it flatly rejected as "wrong" (2474A), "erroneous" (2339-40A, n.6), and "too speculative" (2342A), this Court's holding that CC had been damaged by BP's unlawfully acquiring the power to compel a merger at a time of its choosing (480 F.2d at 380). Further, the District Court gave no weight at all to the illiquid nature of CC's huge block because it valued CC's holdings as if they were only 100 shares (2343A).

The District Court concluded that "the only issue for determination is what *premium* CC's block would have commanded that disappeared once BP took 'control'" (2343A). But then it speculated that although "both parties have argued their positions as if they are assuming that 'control' is *ipso facto* a valuable personal asset" (2353A), it was really a purely "subjective" factor (2354A) which lacked significant value (2374A). Despite Wallace's admissions that BP had acted prudently, the District Court concluded that both these sophisticated contestants had been irrational in the prices they paid for Piper shares. The District Court believed that it was incumbent upon it to "remove the distorted, artificially inflated prices that were being paid by the contestants"

(2345A, n.9). Ignoring the parties' own behavior and their own evaluation of the value of control, the District Court set out on uncharted waters to reconstruct the events to coincide with the Court's own view that the sophisticated entrepreneurs *should* have paid little or no premium for control in 1969 if they had acted like a "hypothetical reasonable purchaser" (2361-62A).

As the first step in this abstract exercise, the District Court determined a so-called "fair market value" for 100 shares of Piper by averaging figures given by the experts for totally different purposes (2352A). The actual average of the experts' figures is $54 a share, but the District Court's alchemy created a hypothetical figure of only $48 per share (2352A).* The Court's figure was less than the actual market price of Piper before ($53) and during ($65-$81) the control contest (650-654A). Next, the District Court hypothesized that the premium for control was 5%—a speculative figure based on the off-the-cuff guess by defendants' expert Gant, who protested that he had not prepared, or been assigned to make, an evaluation of a control premium (2924-25A). Multiplying this mythical 5% by the mythical $48 a share figure for 100 shares, the Court arrived at mythical damages of $2.40 per share.

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* The District Court used Fitzgerald's intrinsic value of $42.10 in computing its average rather than his market value of $55, even though the District Court said it was trying to compute the "*market value* of Piper uninfluenced by the fight for control" (2345A; emphasis added). Moreover, the District Court attributed a figure of $36.75 to Dr. Murray instead of the $57 market price at which he said Piper would have traded in the absence of the control contest. If the correct figures are used, the average is nearly $55 per share (Rosenkranz: $58; Murray: $57; Fitzgerald: $55; Wahrsager: $52; Lank: $52.50; Gant computed a public offering price for the block as a whole, not a market price for 100 shares in the absence of a control contest). The District Court's $48 "average" was in fact lower than the value of 100 shares found by any expert called by defendants or plaintiff.

The fact that the District Court chose a token 5% control premium is hardly surprising. Although this Court stressed CC's lost opportunity for control, and the market and the parties attached great value to control (2834A, 2969A, 3017A), the District Court basically rejected this view. It stated that it was not "apparent that CC could have enhanced its investment by gaining control" (2357A); CC "lost nothing in this regard when it lost the fight for a majority" (2360-61A); and "[t]he Court has searched vainly in the record for specific identification of the advantages of control to CC reducible to money value" (2367A).

The award of damages of $2.40 per share masks the reality of the damage that CC actually suffered. It ignores the fact that CC's actual cost for its plurality position was $64 per share; that its commanding plurality lead was worth $72 per share (still less than the $80 BP actually paid); and that it could at most have realized only $27 if a public offering of its 700,000 shares was even possible after BP's illegal seizure of control. This amounts to actual damages of $45 per share. Indeed, if the District Court had deducted from its $50.40 plurality value ($48 + $2.40) the maximum price ($34) that Gant said CC might have realized from a September 5 sale pursuant to a hypothetical and unattainable covenant to register, it would have arrived at damages of not less than $16.50 a share.

In short, the District Court, presuming that control had no value, and that CC's illiquid minority block was the equivalent of a marketable 100-share unit, found no damages. It awarded a nominal sum, we submit, only to pay lip service to the mandate of the Court of Appeals, "however erroneous the lower Court may deem that mandate to be" (2340A).

**Injunctive Relief**

The District Court also defied this Court's mandate that BP be "denied the fruits" of its illegally acquired shares by enjoining BP from voting them for at least 5 years. While barring BP from voting its contraband shares for the minimum 5-year period, the District Court fashioned a host of injunctive restraints against Piper and CC that allowed BP to retain *de facto* control of Piper during that 5-year period.

First, the District Court directed that Piper's by-laws be rolled back to 1969 and that its board of directors be reduced to and frozen at eight. This assures BP, under Piper's cumulative voting system, of four of Piper's directors during the injunction term, thus building in a deadlock and preventing any change in management without BP's approval. (*See* pp. 51-52 *infra*). Control thus rests in management selected by and beholden to BP.

Next, the District Court declared that BP's 14½% illegally-acquired shares should be considered "outstanding" during the 5-year injunctive period (2397A), thus allowing BP to block unilaterally all shareholder action which requires a majority vote. (*See* pp. 52-53 *infra*).

Finally, the District Court enjoined CC from, among other things, causing Piper to merge or issue any stock during the injunction term. The District Court stated that to permit CC to vote for a merger would be tantamount to "confiscating" BP's shares (2398-99A). Yet, it is this very power to merge, unlawfully acquired by BP, which the District Court refused to weigh in calculating CC's damages.

**Other Relief**

The District Court rejected CC's claim for reimbursement for over $14,000,000 in interest costs CC has incurred in carrying its 700,000 shares since 1969. It did so by concluding: "There has been no showing that CC has been 'locked-in' so that the sale of its Piper stock has been impossible" (2383A). But all the experts on both sides agreed that CC had no escape.

Finally, the District Court disallowed CC's claim for attorneys' fees, saying: "If anything is clear concerning this lengthy and bitterly fought litigation, it is that the service of the public interest was not CC's motivation and any such service has been wholly incidental and has been amply satisfied by the damages awarded to CC" (2388-89A). This, we submit, is another reflection of the District Court's original view as to the role of private securities litigation (337 F. Supp. at 1139, 1146).

**Denial of a Request for a Stay**

CC requested a stay of the District Court's decree pending appeal. The District Court denied this request on the ground that "none of the provisions operate to the disadvantage of plaintiff" (2400A). Thus, the District Court, *inter alia,* started the clock running on the minimal 5-year injunctive provisions prior to the time when its judgment was final and no longer subject to review.

# ARGUMENT

## POINT I

## THE DISTRICT COURT IGNORED THIS COURT'S MANDATE AND COMMITTED OTHER ERRORS IN CALCULATING TOKEN DAMAGES.

### (1) This Court's mandate was clear and not confusing as claimed by the District Court.

The District Court professed confusion about what this Court meant when it held that CC was entitled to compensatory damages.

There is no basis for that confusion or for the District Court's rejection of "the broader remedial intent evidenced by the general thrust of the appellate decision." The opinions of the panel leave no doubt that this Court intended that CC be awarded "compensatory damages." In view of the lower court's perplexity, we quote in some detail exactly what this Court said on this subject:

> "CCI has shown that it had a reasonable chance of obtaining control of Piper, but lost the opportunity because its opponent gained control through means illegal under federal law." 480 F.2d at 361-62.
>
> * * *
>
> "What the securities law violations caused was a denial to CCI of a fair opportunity to compete for control of Piper. The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's unfairly obtaining control. CCI spent large sums of money in actively seeking control. Its purchases were made in the reasonable belief that its opponents would battle hard but within the law. CCI is entitled to compensatory damages for the decline in the value of the minority shareholder's interest with which it became encumbered as a result of competing

against those who violated the securities laws." *Id.* at 375-76.

* * *

"BPC's unlawful conduct denied CCI a fair chance to compete for control of Piper. We cannot say that CCI would have obtained a majority of Piper stock had BPC not violated the law, but it is a fact that BPC obtained control through its unlawful acts . . . . BPC's attainment of a majority position has caused CCI to suffer a decline in the value of its Piper holdings." *Id.* at 378-79.

* * *

"We have held that the unlawful conduct . . . [of the defendants] has caused financial loss to CCI for which it should be compensated. The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time." *Id.* at 379-80.

* * *

"Damages tend to have a didactic effect. The SEC has, through our decision in the companion cases now largely achieved its commendable purpose." *Id.* at 395.

* * *

"[W]here a party acquires control of a target corporation through violation of applicable provisions of the securities acts and regulations promulgated thereunder (in this case Rule 10b-6), it is liable as a matter of law to a competitor for any damages caused by the illegal conduct." *Id.* at 400-01.

* * *

"The relief granted is bitter medicine which will be far more effective than a blanket injunction in deterring infraction of the law." *Id.* at 406-07.

This Court recognized that CC had been damaged both by being denied a fair opportunity to obtain control and

by being frozen into an illiquid minority position subject to being taken by BP at any time through a merger. The District Court rejected both elements of damage. We shall consider the latter first.

### (2) The District Court ignored the damage CC suffered by being frozen into a minority position subject to merger at any time.

This Court, as noted above, stressed that BP's illegal seizure of control had the effect of "reducing CC to a minority position, and thus being able to compel a merger at any time" (480 F.2d at 380). The District Court rejected that holding and refused to consider this factor in calculating damages.

#### *(a) The erroneous claim that BP could not compel a merger*

The District Court stated at the trial that this Court was "wrong" in assuming that BP had the power to compel a merger (2474A). It repeated that view in its opinion, stating that "BP by no means instantaneously achieved the absolute power to compel a merger 'at any time' when it obtained 51% of the Piper shares"; that "it is not at all clear that the Court of Appeals considered the effect of cumulative voting or Piper's even-man Board of Directors"; that, in actual practice, BP could have, with certainty, elected only 4 of Piper's 8 directors in 1969 under cumulative voting when it achieved 51% stock ownership, but that a merger would have required a majority vote of the Board (2339A).

However, as the District Court itself conceded, BP could have used—and did use—its 51% voting power to change the number of directors to an odd, rather than even, number thereby achieving the power to elect, with its shares

alone, the majority necessary to effect a merger (2339A). Inexplicably, the lower court brushed this aside with the statement that "the ability to so alter the Board hardly is akin to the Court of Appeals' determination that BP gained the power to force a merger 'at any time' " (2340A). The District Court thus concluded that the underlying premise of this Court's measure of damages was "erroneous" (2340A).

Even if it were free to disregard this Court's decision, the District Court is incorrect both as a matter of law and fact. At all times defendants had a majority of Piper's Board,* changing the number of Board seats to meet their own requirements. The suggestion at the damage hearing that BP did not gain the power to merge came not from BP but from the District Court (2473-74A). BP has constantly acknowledged that it had the power and intent to merge and was precluded from exercising it only by the stipulation exacted by this Court on the argument of the first appeal** (426 F.2d at 573).

Indeed, the lower court contradicted its own disparagement of this Court's reasoning when it enjoined CC from changing the Piper Board to an odd number during the

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* On September 5, five of Piper's eight directors were firmly committed to merger: four BP officers and defendant William T. Piper, Jr., who publicly announced his support for merger on May 8 and who by September 5 was a principal shareholder of BP (330A).

** For example, BP's prospectus for its exchange offer stated:

> "If [BP] succeeds in acquiring at least a majority of the outstanding common stock of Piper, it would acquire the power to cause Piper to merge, consolidate, sell its assets or liquidate without concurrence of the remaining Piper common stockholders . . ." (EV 31; *see also* 1883A).

BP had not only the power, but the intent to merge. BP stipulated, and the District Court found as a fact at the first trial, that BP entered the May 8 agreement with the Piper family for the very purpose of effecting a merger with Piper (326A, EV 1467-68, 1471, 1481-82).

next five years on the ground that this could give CC the power to compel a merger—a power which the District Court said would be tantamount to the power to "confiscate" BP's Piper stock (2398-99A).

***(b) The District Court erroneously resolved all uncertainties concerning BP's use of its merger power against CC, the victim.***

Aside from the fallacious proposition that BP lacked the power to merge, the District Court gave another incorrect reason for refusing to consider the merger power as an element of damage.

> "It is unclear as a matter of practical finance whether BP would in fact choose such a time [the bottom of a business cycle] for a merger" (2341A).
>
> * * *
>
> "No one can guess when, or even if, BP would ever force CC to submit to or seek a statutory appraisal or predict in what presently unforeseeable way BP might legitimately turn control to its advantage and CC's disadvantage" (2342A).
>
> * * *
>
> "BP's 'power' to compel a merger is, standing alone, too speculative to quantify. It is highly doubtful that the Court of Appeals intended that this Court should engage in such conjecture" (2342A).

But this Court did direct the District Court in no uncertain terms to include BP's power to compel merger at the time of its choosing as an element of damages. BP clearly had the power and the economic incentive to select a time to merge that was most advantageous to it—namely, at the bottom of a business cycle, in an industry which is extremely cyclical.*

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* One need only look at the numbers of merger proposals and acquisitions being made at today's depressed prices to appreciate the importance of being able to choose the timing of a merger.

BP's power to trigger a merger or statutory appraisal at a time most opportune to it and the consequent disadvantages and the uncertainties to CC are the very factors that drastically reduce the value of CC's minority block and make it unmarketable to a third party or the public. For the District Court to say that the uncertainty created by BP's illegal power is too great to measure is to admit how massive the reduction in value is. If the lower court cannot say when and how BP may disadvantage CC's position, what knowledgeable investor would pay any reasonable price for CC's position!

Moreover, since defendants themselves created the element of uncertainty which is a cloud on CC's $44 million investment, they must bear the burden. That is the teaching of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1964), discussed at pp. 48-50 *infra*, where the Court declared:

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."

Here, in giving no weight at all to the cloud on marketability created by BP's power to merge at any time, the District Court not only disregarded this Court's mandate, but reversed the *Bigelow* rule by resolving all doubts—real or imaginary—against the victim.

***(c) The District Court erroneously equated CC's 700,000 Piper shares to 100, thereby disregarding the illiquidity factor of CC's block.***

The District Court also committed error and failed to award CC damages because it refused to recognize the illiquidity of CC's 700,000 share minority position in Piper,

although this Court stressed that CC had become "encumbered" with a minority position (480 F.2d at 376), and the experts on both sides recognized that the block was unmarketable. (*See* p. 11 *supra*). The District Court equated CC's 700,000 share block with 100 shares, stating that the "relevant block for purposes of such an evaluation is merely an anonymous 100-share block" (2343A). But an owner of 700,000 shares can hardly be equated with the owner of 100 shares. The courts have recognized substantial discounts of as much as 50% or 60% in situations far less extreme, taking into account such factors as the need to register, the minority's lack of control, and "blockage" (the large size of the block compared to the float).

Thus, unmarketability because of the requirement to register was recognized as a substantial depressant of value in *Kaufman* v. *Diversified Industries, Inc.*, 460 F.2d 1331, 1335-36 (2d Cir.), *cert. denied*, 409 U.S. 1038 (1972). There, this Court upheld a discount of 50% from the market price of a block of "letter stock" because—as in the case of CC's 700,000 shares of Piper—the block had to be registered before sale. *See also Thomas* v. *Duralite Co.*, CCH Fed. Sec. L. Rep. ¶94,864 at p. 96,943 (D.N.J. Nov. 7, 1974) (letter stock "worth really only a fraction of the stock then actually free to trade"); *Alloys Unlimited, Inc.* v. *Gilbert*, 319 F. Supp. 617, 619 (S.D.N.Y. 1970) (Mansfield, J.). CC's block is, of course, far less marketable than letter stock, which, once registered, may trade without the threat of taking by merger. But a purchaser of CC's stock, even if there could be a secondary registration, would be buying a "pig in a poke"*—an unknown package of BP's paper to be issued at some unspecified

* As Dr. Murray testified:

"It seemed to me that going to a potential buyer of the shares, the shareholder would ask the simple question: My dear friend and investment banker, what are you selling me?" (2579A)

merger date (2579-80A). Indeed, Gant acknowledged that CC's minority position could not be sold as a block or "on an investment letter basis" (EV 1244-46).

The courts have also stressed that the very size of a block can have a depressing effect on price if offered in the marketplace—the so-called "blockage rule." For example, *Helvering* v. *Maytag,* 125 F.2d 55 (8th Cir.), *cert. denied,* 316 U.S. 689 (1942), allowed a 30% blockage discount because the block represented one-half of the float.* Here, CC's 42% interest was more than six times the float.

And in the recent case of *Rushton* v. *C.I.R.,* 498 F.2d 88, 91 (5th Cir. 1974), the Court declared it was the law in every Circuit that in determining the fair market value of securities "the judicial attitude [has] hardened from one *permitting* the trier of fact to consider the blockage effect to a rule *requiring* that it be considered . . ." (emphasis in original).

Finally, the very fact that a minority block in a corporation controlled by others represents an impotent interest compels a significant discount. In *Dryborough* v. *United States,* 208 F. Supp. 279, 287-88 (W.D. Ky. 1962), the Court discounted by 35% the value of a 40% minority because it "cannot control policy, dividends or liquidation of the corporation, and, therefore, such interests are not readily marketable. . . ." *Righter* v. *United States,* 439 F.2d 1204, 1218 (Ct. Cl. 1971), recently summarized the law in this area:

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* *See also Whittemore* v. *Fitzpatrick,* 127 F. Supp. 710 (D. Conn. 1954); *Havemeyer* v. *United States,* 59 F. Supp. 537 (Ct. Cl.), *cert. denied,* 326 U.S. 759 (1945); *Gallun* v. *Commissioner,* CCH Tax Ct. Rep. [Dec. 32,830, Mem. 1974-284]; Vass, *Factors That Are Presently Being Emphasized in Valuing a Closely-Held Corporation,* 38 J. of Taxation 356, 358 (1973).

"[T]here is the significant fact that the stock involved here was a minority interest of only 17 percent in a closely held corporation. It is logical to assume that this would adversely affect its value if it were offered for sale on the open market, as few people would be interested in buying it under these circumstances. The decided cases support this view."*

In short, all of the factors which have led courts in other circumstances to discount the value of a large minority block are present here, but magnified to an unprecedented degree. In no other case was liquidity further impaired by the threat of merger on uncertain terms. Yet, the District Court, in a decision contrary to all precedent and reason, refused to allow *any* discount for the illiquidity factor.

### (3) The District Court ignored the damage CC suffered by being denied a fair opportunity to compete for control in a race in which it led.

The District Court effectively rejected the other major factor in the Court's damage mandate—namely, CC's loss of an opportunity to compete for control in a tight race in which it would have held a commanding lead if defendants had not illegally acquired the decisive 14½% of Piper's stock. The District Court avoided this branch of the damage mandate by a series of erroneous theories:

#### *(a) The erroneous and irrelevant claim that CC would not have won control*

The District Court—reverting to the rationale of its prior opinion on the issue of causation (337 F. Supp. at 1137-39)—asserted that CC failed to prove that it *definitely*

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* *See, e.g., Whittemore* v. *Fitzpatrick, supra,* which contrasts the per share value of a controlling block of stock with the substantially lower per share value of a minority block; *Bardahl* v. *Commissioner,* 24 T.C.M. 841 (1965). And *see,* Feld, *The Implications of Minority Interest and Stock Restrictions on Valuing Closely-Held Shares,* 16 Corp. Prac. Comm. 346, 348-49 (1974).

would have won the race if defendants had not violated the law (2331A). But this Court, relying on the *Mills-Ute* test,* rejected the causation argument (480 F.2d at 373-74). Moreover, this Court found that BP definitely won because it *did* violate the law (480 F.2d at 373, 379); and that otherwise CC would have had a reasonable chance of obtaining control of Piper (480 F.2d at 375-76). Indeed, when the issue of CC's chance of success was probed at the second trial, the experts—including defendants' expert Gant—agreed that CC's chances were formidable. (*See* p. 8 *supra*). The statistical probabilities, but for defendants' illegal acquisitions, were over 99% in CC's favor. (*See* pp. 8-9 *supra*).

But CC need not prove that it definitely would have won if defendants had not rigged the race, despite the District Court's insistence. It is sufficient that defendants deprived CC of a fair chance for success in a contest where the margin of victory was slim—a margin consisting of either of BP's illegal 7% blocks. This Court repeatedly stressed that the denial of the fair chance was enough (480 F.2d at 375-76). Thus, even if the second trial had not shown that CC would have been a sure winner in a fair contest, the District Court rejected the proven probabilities, magnified the uncertainties and resolved them against CC.

***(b) The fallacious claim that control was worth nothing***

Although this Court repeatedly stressed that CC was denied a fair opportunity to seek control, the District Court held that control would not have had any value to CC. Thus, it stated:

> "[I]t is not at all clear that CC entered the contest to gain control of Piper and it is even less apparent

* *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972).

> that CC could have enhanced its investment by gaining control" (2357A).
>
> * * *
>
> "Thus, in the long run, CC lost nothing in this regard when it lost the fight for a majority of the stock" (2360-61A).

The notion that control was valueless defies the two prior opinions of this Court; the unanimous views of the sophisticated control contestants, reaffirmed at the damage trial by BP's Wallace himself (*see* p. 20 *supra*); the teachings of the marketplace; and the controlling views of courts and leading commentators, including the District Judge's own opinion in *Christophides* v. *Porco,* 289 F. Supp. 403 (S.D.N.Y. 1968).*

### *(c) The claim that the prices paid by BP and CC were not entitled to any probative weight*

The District Court flatly rejected as probative of the value of control the prices paid by BP and CC in their efforts to gain control. Ignoring Wallace's testimony that BP acted prudently and would not to this date sell CC its illegally acquired 120,000 share control block, the District Court stated:

> "The amounts paid by the contestants in the midst of the battle are by no means the sole or even a fair indication of the premium relevant here. . . . The amounts paid were clearly wildly and artificially inflated due to the emotional, as well as actual, struggle of the parties" (2344A, n.8).

The District Court's disregard of the prices paid by the parties in their pursuit of control is contrary to all precedent. It is a conventional rule of damages for securi-

* *See also Honigman* v. *Green Giant Co.*, 309 F.2d 661 (8th Cir. 1962), *cert. denied,* 372 U.S. 941 (1963); *Essex Universal Corp.* v. *Yates,* 305 F.2d 572 (2d Cir. 1962).

ties fraud that the plaintiff is entitled to recoup his cost. (*See* pp. 57-59 *infra*). And in otner contexts, the courts have consistently recognized that the prices actually paid for shares in the open competition of the marketplace, whatever may be the motives of the buyers and sellers, are the true determinants of value. As Judge Weinfeld stated in *Levin* v. *Mississippi River Corp.*, 59 F.R.D. 353, 370 (S.D.N.Y. 1973), *aff'd sub nom. Wesson* v. *Mississippi River Corp.*, 486 F.2d 1398 (2d Cir. 1973):

> "The market evaluation of a stock may reflect a more realistic appraisal of its value than a conceptual evaluation. Theory must yield to the reality of the marketplace, 'the true appraiser.' "

Judge Learned Hand felicitously expressed the same view when he stated that, "When all is said, value is nothing more than what people will pay for the shares, given as wide an opportunity for bidders to come in as is reasonably possible." *Borg* v. *International Silver Co.*, 11 F.2d 147, 152 (2d Cir. 1925).

This principle is of particular force here, where the highest prices paid were by defendant BP after an examination of the control potential of Piper, and on the advice of defendant First Boston, Piper's own investment banker (1830A).* In fixing the value of an asset of which a plain-

* Indeed, the District Court found at the first trial that the parties were sophisticated businessmen who knew precisely what they were doing in paying premiums for control of Piper:

> "The contest for control of Piper was sophisticated and hard fought. The contenders were men accustomed to the handling of vast sums of public capital, were assisted by skilled professionals and were themselves seasoned in corporate tactics." 337 F. Supp. at 1131.
>
> * * *
>
> "The price it [BP] paid for Piper it paid with open eyes. The rapport between it and the Piper management should have given it more easy access to information about Piper than was available to Chris-Craft—even with two Chris-Craft representatives on the Piper Board." *Id.* at 1153.

tiff has been wrongfully denied, the courts will not permit the defendant to disavow the price which he placed on the asset in a contemporaneous transaction.* Thus, in *Triangle Waist Co.* v. *Todd*, 223 N.Y. 27, 31 (1918), an action against a defendant who in breach of an agreement with one employer accepted another employment, Judge Cardozo wrote:

> "The defendant may be assumed to have known what her own services were worth. . . . She will hardly say that the payment which she exacted was excessive and unfair."

Here, defendants have not claimed the $80 a share price paid by BP in seeking control was excessive. Only the District Court did.

To support its hypothesis that control had little, if any, value, the District Court engaged in a series of conjectures not supported by the record.

**The Existence of Another Large Block.** The Court conjectured that CC's plurality position would have been worth very little to a "hypothetical reasonable purchaser" because BP would have remained in the battle and not "dropped out" (2364A). But if CC held a lead of 41%-31% or more at the end of the exchange offer in August 1969 and had an excellent chance of success, why should it be assumed that BP would have spent large sums of cash against 99-1 odds? (2480-81A) Indeed, by its own admission, BP's policy was not to commit cash unless victory was certain (EV 300), and BP President Wallace never once

* New York courts accord the purchase price paid for property "controlling significance" in determining value, "particularly . . . [when] the underlying transaction was made at arm's length between two sophisticated . . . operators." *Plaza Hotel Associates* v. *Wellington Assoicates, Inc.* (1st Dep't), N.Y.L.J., Nov. 1, 1974 at 2, col. 3.

suggested that BP would violate its own policy by staying in the race if CC had taken a 41% to 31% lead.*

The District Court relied on BP's aggressiveness as an element in reducing CC's damages (2364A). But it is hardly appropriate to use in mitigation of damages the fact that BP was willing to go to any length, including violating the law, in order to obtain control for itself.

Similarly, the District Court speculates that the winner of the contest "knew full well that it would be faced with a large and highly vocal minority opposition" and that "whatever majority control is worth where the balance of the ownership is scattered and uncoordinated, a majority position is worth less to a third party where a large minority holding exists" (2365A). This pyramids assumption upon assumption. The fact that BP itself entered the control contest when CC already had 33% shows that the existence of a 31% counter-block would not detract from the value of control. Rather, it enhances the leverage of the victor. Since the minority cannot sell its position to a third party or the public, the majority owner is, as Gant admitted, in a position to drive a hard bargain in setting merger terms or buying out the minority (2875-78A). And where a position has been accumulated lawfully, as was CC's, why should the Court, in reduction of CC's damages, assume that BP would have any grounds for a lawsuit?

Finally, the District Court's logic places a premium on violating the law where the race is close. This is precisely the circumstance in which the temptation, and concomitant need for deterence, is greatest. For the stakes could

* Indeed, BP told the Piper insiders that BP would be unwilling to enter the contest at all if CC's lead were greater than 33%-31% (3194A).

not be higher—control on the one hand, a locked-in position on the other. Yet, if the District Court's rationale is accepted, the penalty for breaking the law will be near nil, since the party seizing control illegally can always say that the value of his prize is mitigated by the large block with which the opposition has been trapped.

**Piper Management.** The District Court also substantially discounted a premium for control by assuming that if CC obtained a majority it would have faced continued resistance from the Piper family and would have been forced to replace the Piper management, causing "a significant future financial and psychological expense" (2361A). But the existing management of Piper was not indispensable. BP itself, after illegally seizing control, quickly deposed the Pipers (EV 1301-04, 1307). This was a case in which control had particular value because the existing management was not realizing the company's potential (2538A, 3026A).

**CC's Alleged Intent to Sell.** The District Court further discounted the valve of control by conjecturing that CC probably sought control to sell it at a profit rather than for a long-range investment (2358-60A), and that CC could not keep a control premium "if the sale of such a position was to deliver control or use it to benefit himself [CC] at a minority's expense" (2363A), citing *Perlman* v. *Feldman,* 219 F.2d 173 (2d Cir.), *cert. denied,* 349 U.S. 952 (1955). But there is no basis to speculate that CC bought to resell.* Assuming *arguendo* that it did, there is no basis

* Gant himself recognized the implausibility of such a hypothesis (2918A); the defendants themselves contended that CC wished to exercise, not sell, control (164A, 169A, 246A); and contrary to the District Court's assumption, CC has not been a liquidator, but an operator of its acquired businesses (1590A, EV 321-330), and this Court itself agreed that CC's "objective was control" (480 F.2d at 376).

to speculate that it would have sold control to injure the minority or that it would have engaged in the type of abuses condemned in *Perlman*. Again, the District Court dreamed up straw men and then resolved these fancies against CC. The law is clear that control can be sold at a premium by the majority stockholder. *Essex Universal Corp.* v. *Yates*, 305 F.2d 572 (2d Cir. 1962). Indeed, in *Christophides* v. *Porco*, 289 F. Supp. 403, 405 (S.D.N.Y. 1968), Judge Pollack himself wrote:

> "[A] majority or controlling stockholder is under no duty to other stockholders to refrain from receiving a premium upon the sale of his stock which reflects merely the control potential of that stock . . . . Control is not a corporate asset, but is rather an attribute of stock ownership."

**CC's Alleged Inability to Improve Piper's Operations.** Finally, the District Court discounted the value of control by conjecturing that CC (if it did not sell its Piper stock) could not possibly have "altered or improved the Piper picture" because CC's President "acknowledged his unfamiliarity with the aviation business" (2359-60A). But there is no basis for resolving any possible uncertainty on this score against the victim, which was deprived by BP's unlawful acts from exercising control. In fact, Piper has not prospered under BP's control. When BP consulted CC, CC made exceptional contributions to Piper's welfare according to BP's President (2954A, 2953-58A); and the record shows that CC attracted executives of talent, including Clifford Goad, the retired Executive Vice-President of General Motors, and former head of the Navy's Wildcat aircraft program (1551A); and John Z. DeLorean, former Vice-President and General Manager of all of G.M.'s North American operations, who presently serves as a CC director and consultant (PX 162 (1973)).

**Summary**

This Court concluded that control had value. The parties knew that control had value and paid tens of millions of dollars to achieve it. And the courts and commentators have uniformly recognized that control has substantial value. Only the District Court in this case assumed control has no value.

This Court also recognized that CC's plurality position had been illegally converted into a large illiquid minority block under a merger cloud. The parties and experts agreed. Again, only the District Court disagreed.

The District Court awarded nominal damages by allegedly "following the strict literal meaning of the words [of this Court's decision rather than] the broader remedial intent evidenced by the general thrust of the appellate decision" (2333A). This approach was aptly described by Judge Friendly in *United States* v. *Certain Property*, 344 F.2d 142, 146 (2d Cir. 1965), in rejecting the lower court's and Government's theory of damages:

> "Acceptance of this argument would indeed keep the word of promise to the ear and break it to the hope."

This Court stated that the award of compensatory damages should be "bitter medicine" and of "didactic" effect. But the didactic effect of this award is that the securities laws can be violated with impunity. The bitter medicine has become a sweet elixir.*

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* The monetary cost to BP of the damage award has been regarded in the financial community as "relatively insignificant." *Value Line*, ed. 9, p. 1404 (Dec. 6, 1974); *see also Value Line*, ed. 7, p. 1000 (Nov. 22, 1974). And *The Wall Street Journal* stated, "A source close to the defendants in the case said they were pleased by the small amount of the award." *Wall St. J.*, Nov. 7, 1974, p. 18, col. 2.

## POINT II

### IN ASSESSING TOKEN DAMAGES THE DISTRICT COURT VIOLATED THE *BIGELOW* RULE.

The District Court's opinion is replete with specul tion and expressions of doubt. Its litany of uncertainty includes: whether BP would merge at the optimum time, when Piper's price was lowest; whether CC would have won control absent BP's violations; whether CC could have improved Piper's operations if it had won control; whether CC had, in fact, entered the battle to gain control; whether BP would have continued the battle even if the odds were 99 to 1 in CC's favor; whether BP, by being a litigious minority, could have emasculated the value of control to CC; whether CC could have sold a controlling position, and, if so, whether it could keep the premium; and, above all, whether control of Piper was really worth anything.

As shown in Point I, the District Court in arriving at its nominal damage award resolved each of these uncertainties, fanciful and unfounded as they were, against CC. In so doing, the District Court violated the teaching of *Bigelow* that "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created" (327 U.S. at 265).

That principle is the touchstone of damages, particularly in actions to implement rights under federal regulatory statutes. As the Court said in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931):

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental

> principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."

*See, e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969); *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co.*, 316 U.S. 203, 207 (1942); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927).

Indeed, this Court, in a recent decision denying a preliminary injunction on grounds of adequacy of damages, answered the claim that damages would be nearly impossible to compute by saying that under *Bigelow* the defendants would appear to have the burden of proof on the "causality" of the damages. *Columbia Pictures Industries, Inc.* v. *American Broadcasting Cos.*, 501 F.2d 894, 898 (2d Cir. 1974).

The principle of *Bigelow* has, of course, been applied in determining damages in other securities cases. For example, in *Feit* v. *Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544, 585 (E.D.N.Y. 1971), involving a misleading registration statement used on an exchange offer, Judge Weinstein stated in calculating damages:

> "We recognize that once a plaintiff has shown that the defendant has violated his substantive rights and that he is entitled to damages, he ought not to be held to the high level of proof required for other elements of this case. The somewhat speculative nature of damages ought not to prevent a plaintiff from recovering; where there is a substantial question, the facts must be construed, within reasonable limits, against the tort feasor [sic]."

And this Court, which in 1970 denied CC a preliminary injunction in the belief that adequate damages could be

awarded, left no doubt that it intended that the defendants should bear all the risks of any uncertainty created by their illegal acts. Thus, Judge Timbers declared:

> "By 'resolving doubts in favor of those the statute is designed to protect', *Mills* v. *Electric Auto-Lite Co.*, *supra,* 396 U.S. at 385, we are implementing the congressional intent not only to protect investors, but to make sure that contests for control between offerors and incumbent management, or other offerors, shall proceed fairly." 480 F.2d at 375.

The principle at stake in this appeal far transcends the interests of the particular victim before the Court. The Supreme Court, in a long line of decisions beginning with *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), has emphasized that private actions for violations of the securities laws provide a vital supplement to the enforcement activities of the SEC. Few cases, of course, reach the stage of assessment of damages. But if in an action such as this where the injury is massive, the courts are to be "blind as judges to what they know as men" and preclude compensatory damages by resolving all doubts against the victim, then the right of private action recognized by *Borak* and its progeny will be a hollow one.

That the District Court followed a different course and rejected the "remedial intent" of this Court's decision is understandable. Since it was of the conviction that the securities laws were not intended to protect "sophisticated" parties, it follows that any amount fixed as damages, no matter how paltry, would be more than was deserved. It is that unspoken premise, we submit, that permeates the District Court's opinion.

## POINT III

### THE DISTRICT COURT IGNORED THIS COURT'S MANDATE IN FASHIONING INJUNCTIVE RELIEF AGAINST CC AND GIVING BP *DE FACTO* CONTROL.

This Court ruled that "BPC should be denied the fruits of obtaining Piper shares illegally" and therefore the District Court should "include in its judgment an injunctive provision barring BPC from voting for a period of at least 5 years" the 14½% of Piper shares acquired unlawfully (480 F.2d at 380). In other words, under the Court's mandate, BP would be able to vote only 37% of its 51% Piper shares, whereas CC could vote its 42% block. This would give CC working control of Piper. But, the District Court, while issuing a five-year injunction against BP's voting the illegal 14½% block, defied the purpose of the mandate by giving BP *de facto* control during the five-year period. The District Court accomplished this result by issuing a panoply of injunctions against Piper and CC. Thus:

(1) The District Court directed that Piper's by-laws be "rolled back" to September 5, 1969 and frozen during the five-year period (2030A). The intent was to freeze the Board at eight directors. Accordingly, by virtue of Piper's cumulative voting system, the Board will be deadlocked with BP and CC each electing 4 directors.* This gives BP the power to continue controlling Piper.

* Excluding BP's illegal 231,002 shares, there will be 1,413,788 Piper shares entitled to vote for directors. BP holds 629,919 votable shares (44% of the shares eligible to vote), CC owns 708,300 shares and the public has the remaining 78,569 shares. Under cumulative voting for an eight-man Board, CC and BP will elect four and three directors, respectively, no matter how many of the publicly held shares are voted. However, to elect its fourth director, BP needs no more than 1,432 additional votes from the public shareholders—or less than 2% of the public stock. On the other hand, if all the public shares are voted, CC would need 77,138 of the 78,569 public votes to elect a fifth director.

With an even-numbered Board split between CC and BP, which have basic policy differences as to the management of Piper (2989-90A), effective control will reside in Piper's present management team. During the past five years BP has selected key Piper officials, often over CC's dissent (2977A, 2989A, 3004A). A deadlocked Board cannot change these appointments (EV 1277-78). Moreover, Piper's executives are obviously aware that BP will regain legal as well as *de facto* control in 1979, and they certainly will be responsive to its wishes in the interim. In short, the District Court has insured that BP will keep its illegally acquired control of Piper during the injunctive period, despite this Court's mandate to the contrary. Nothing has changed.

The District Court's explanation for this disregard of the mandate was inconsistent. Thus, its main opinion states that in view of the 5-year injunction "CC will probably take management 'control' . . . . CC may thus, if it be so advised, alter management policies during the injunction period" (2378A, n.21). But, in its Supplemental Opinion, the District Court recognized that the Board will be deadlocked and then rationalized that CC "will have gained an advantage that its equity voting strength did not entitle it to without the injunction" (2400A).

(2) The District Court also provided that all of BP's shares, the illegally-acquired 14½% as well as its other shares, should remain "authorized and outstanding for all purposes under the laws of Pennsylvania and under this decree" (2392-93A). Under Pennsylvania law, a majority of the outstanding shares must vote in favor of any proposed issue of capital stock, merger or amendment of the articles of incorporation. This means that BP, with 51%

of Piper's "outstanding" stock, will be able to veto any proposed action that requires a majority vote of the outstanding shares. It will be able to block action on major corporate matters favored by the public shareholders and CC, no matter how clearly in the corporation's best interest. The District Court's statement that this provision of the decree "does not give Bangor Punta a negative vote" (2399A) defies reality.

(3) Reinforcing BP's negative vote, the District Court also explicitly ordered that CC and its designees on the Piper Board shall not "vote for or acquiesce" in the increase or redemption, purchase or reduction of any Piper voting stock beyond the number outstanding as of September 4, 1969 or vote for a merger of Piper with any other company (2394A). Thus, in addition to overcoming BP's negative vote, CC would have to get approval of the District Court for major corporate action, no matter how advantageous the action or how pressing the deadline.

The explanation which the District Court gave for these unauthorized restraints was that it feared that CC might otherwise effectuate a merger and that this would have the effect of "confiscating" BP's Piper stock (2398-99A).* Yet the District Court refused to award any damages to CC arising from BP's power to cause a merger, although this Court specifically directed it to do so.

Aside from keeping BP firmly entrenched in power contrary to the mandate's purpose, the District Court did not give due consideration to this Court's directive that the 5-year injunctive period was only a minimum and could be made longer. On the contrary, the District Court's in-

* But, as BP's President confirmed at trial, there has never been any indication that CC sought to dilute BP's position (2961A).

junction chopped time off the required 5-year period because the clock began to run from the entry of the District Court's judgment, months before the required shareholders' meeting could be held to elect new directors and while the case is on appeal. The injunctive period should, for the reasons explained below (p. 62 *infra*), be longer than 5 years.

The philosophy underlying all of the District Court's rulings on equitable relief is curious. The lower court stated that injunctions "are granted sparingly" and stressed its power "to attach protective conditions" (2375-76A).* Then, the District Court stated that it simply wanted to restore the *status quo* in 1969 and therefore it should "not award CC a benefit to which it would not otherwise be entitled" or "lift CC into benefits which its position in 1969 could not achieve" (2378-79A). But the lawful *status quo* which should have been restored was one in which CC held a commanding lead. Instead, the District Court has created a "*status quo*" which gives BP credit for its illegally-acquired shares.

In summary, just as in the case of the token damage award, the District Court has fashioned injunctive relief which does not redress the wrong. The real beneficiary is BP which wrote off its $13 million liability to the Piper family on the ground that the injunction as ordered by this Court denied it control, and which, under the injunction as entered by the District Court, retains control of Piper.**

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* The cases cited by the District Court (2375-77A) as authority for its injunction against CC stand for the proposition that an appellate court may modify a lower court decree. None suggests that a District Court may modify the mandate of the Court of Appeals.

** BP's 1973 annual report states, "[A]s a result of the Court's enjoining Bangor Punta from voting 231,002 Piper shares for at least five years, any obligation to pay the Additional Consideration has been affirmatively extinguished" (EV 1064).

## POINT IV

**THIS COURT SHOULD NOW AWARD CC FULL COMPENSATORY DAMAGES AND FASHION APPROPRIATE EQUITABLE RELIEF AS IT ORIGINALLY INTENDED.**

After five years of litigation, three District Court decisions, two prior appeals and a denial of certiorari, this Court should now enter a final judgment. Such action is particularly appropriate, not only because of the long delay and expense, but also because of the District Court's adamant refusal to follow this Court's two prior opinions. Definitive action is also necessary because of the grievous injury to CC and its public stockholders. Appellate courts have not hesitated to fix damages and equitable relief in circumstances far less egregious. There is ample uncontradicted evidence in the record to permit this Court to take such action in this case.

**This Court has the power to grant final relief.**

This Court clearly has the power under 28 U.S.C. §2106* to determine the quantum of damages and the form of equitable relief. Here, in fact, this Court went halfway down that road on the second appeal by specifically setting forth criteria to guide the District Court on remand.

But the District Court, as shown above, has not accepted that "guidance." Accordingly, this Court should—

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* 28 U.S.C. §2106 provides:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

as it has done before—fix damages and fashion equitable relief. *Georgia-Pacific Corp.* v. *U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2d Cir.), *cert. denied,* 404 U.S. 870 (1971); *United States* v. *Certain Property,* 344 F.2d 142 (2d Cir. 1965); *Alvary* v. *United States,* 302 F.2d 790 (2d Cir. 1962).*

In *Petition of United States Steel Corp.*, 479 F.2d 489, 500 (6th Cir.), *cert. denied,* 414 U.S. 859 (1973), the Sixth Circuit declared:

> "Our prior opinion required the District Court, upon the remand, to reevaluate and recompute the awards '. . . in accordance with the principles herein enunciated.' . . . As indicated above, the District Court has failed in several instances to follow those specific instructions. To specifically instruct the District Court for the second time would seem to be of little value and, accordingly we proceed to modify the awards entered on the remand."

In *Georgia-Pacific,* a patent infringement action, this Court calculated damages in a complex and protracted litigation after the District Court failed to award reasonable profits, even though the Court could not be sure what the royalty would have been if the violator had proceeded within the law (446 F.2d at 299-300).

Similarly, the Fifth Circuit, in *Oil Screw Noah's Ark* v. *Bentley & Felton Corp.*, 322 F.2d 3, 9 (5th Cir. 1963), on a third appeal—as in this case—calculated damages to avoid further delay and injustice, although they could not "remotely approach scientific value."

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* *See also Simpson* v. *United States,* 322 F.2d 688 (5th Cir. 1963); *Texas Co.* v. *R. O'Brien & Co.*, 242 F.2d 526 (1st Cir. 1957); *Smith* v. *Dravo Corp.*, 208 F.2d 388 (7th Cir. 1953) (remanded with directions to enter decree drafted by the Court of Appeals).

In short, this Court has the power to award just damages and to fashion meaningful equitable relief in order to bring this protracted litigation to an end.

**Uncontradicted evidence in the present record affords a basis for this Court to determine damages and equitable relief.**

In many of the foregoing cases, the appellate courts, in fashioning relief, reversed the lower court's factual findings as "clearly erroneous." But this Court need not do that here, although the District Court's factual assumptions were clearly erroneous. The parties here presented totally opposite theories of damages and then introduced expert testimony under those theories. The clash was in legal concepts and the underlying premises of the formulae urged—not in the testimony itself.

While plaintiff's experts attempted to calculate damages in accordance with realistic assumptions, defendants concocted theories which by their terms had to produce zero damages. This Court must reject defendants' opinion testimony as not competent because, as shown above (pp. 14-19 *supra*), it is all based on premises not grounded in fact. 2 Wigmore, *Evidence* §§680, 682 (3d ed. 1940); McCormick, *Evidence* 33 (2d ed. 1972); *Heard* v. *United States,* 348 F.2d 43 (D.C. Cir. 1965).

**Damages**

The record contains ample uncontroverted evidence to calculate damages:

***(a) Valuing CC's holdings absent defendants' violation***

The first step in fixing CC's damages is to determine the value of CC's plurality holdings as they would have

existed absent defendants' illegal acts. The conventional rule of compensatory damages in securities cases is that the victim of fraud is entitled at the very least to recoup the cost of his securities. *See, e.g., Chasins* v. *Smith, Barney & Co.,* 438 F.2d 1167 (2d Cir. 1970); *Esplin* v. *Hirschi, supra,* 402 F.2d 94; *Janigan* v. *Taylor,* 344 F.2d 781 (1st Cir.), *cert. denied,* 382 U.S. 879 (1965). And in other areas of the law, a plaintiff who has been wrongfully denied an expectancy, an opportunity or a prospective advantage, is entitled to recover the greater of his cost or value of the opportunity denied. *See, e.g., Air Technology Corp.* v. *General Electric Co.,* 199 N.E.2d 538 (Mass. 1964); *Locke* v. *United States,* 283 F.2d 521, 525 (Ct. Cl. 1960) (interference with contract bid); *see also De Long Corp.* v. *Lucas,* 176 F. Supp. 104, 125-26 (S.D.N.Y. 1959), *aff'd,* 278 F.2d 804 (2d Cir.), *cert. denied,* 364 U.S. 833 (1960) (plaintiff awarded lost prospective profits after contract bid wrongfully interfered with); *Keco Industries, Inc.* v. *United States,* 428 F.2d 1233 (Ct. Cl. 1970) (bidder awarded his costs).*

Indeed, in discussing the deprivation of opportunity cases, Professor Corbin, referring to such speculative ventures as lotteries, wrote, "The holder would clearly have a right to the restitution of the price paid for the ticket . . . ." 5 Corbin, *Contracts* §1030 at 185 (1964).

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* In *Air Technology,* the Court held:

"We think that such an appraisal can be fairly made with adequate certainty. Nevertheless, whatever may be the difficulties in proving damages, *the amount of recovery cannot be less than the higher of two available alternative measures of damages viz (a) the value reasonably expended by AT in the performance of the joint arrangement, and (b) the fair value of AT's contribution to that arrangement.*" 199 N.E.2d at 549 (emphasis added).

The greater of cost or value principle is particularly appropriate here where CC "spent large sums of money in actively seeking control . . . [by purchases] made in the reasonable belief that its opponents would battle hard but within the law" (480 F.2d at 375-76). As this Court recognized, CC would not have made its Piper investment if it had known that defendants would unlawfully foreclose it from the opportunity for control and leave CC encumbered with an illiquid minority position.

CC paid an average price of $64 per share for its Piper shares (480 F.2d at 354-55). The value of its plurality at the end of the exchange offers in August 1969 but for defendants' violations was worth $72 per share according to Wahrsager of Bear, Stearns. His opinion was, if anything, conservative. For BP, entering the contest months after CC, paid—on First Boston's contemporaneous advice—an average of $80 per share for the opportunity for control. Defendants themselves offered no evidence that the value of control was less. (*See* pp. 20, 41 *supra*).

As a matter of law, CC is entitled to the greater of cost or market value. If there is any doubt as to whether to use $72 or $64 per share as the starting point in calculating damages, the higher price must prevail under *Bigelow*.

### *(b) Valuing the reduction*

The issue then narrows down to the reduction in the value of CC's block due to BP's violations—namely, the quantification of the locked-in minority position under a merger cloud. Here too, there is sufficient undisputed expert testimony on which this Court can rely.

(1) All the experts agreed that no third party would buy CC's 41% block. (*See* p. 11 *supra*). A public offering, while a theoretical possibility, was in fact precluded by the fact that Piper's certified financials were not ready until May 1970 (by which time the market had collapsed), as well as by the unwillingness of BP and Piper to cooperate.

Since CC had no practical way to dispose of its stock once BP illegally seized control, the appropriate relief would be to require BP to purchase CC's block at its estimated value at the time of defendants' violations ($72 per share) or at its actual cost ($64 per share). This approach would avoid all uncertainties as to valuation of the minority block—both from the standpoint of plaintiff and defendants—and place upon the wrongdoer the full burden of the loss without the need for speculation as to what an unmarketable block is really worth.

This Court recently recognized that such relief in the form of restitution is appropriate even where the plaintiff did not purchase its shares from, and was not in privity with, defendants. *Gordon* v. *Burr,* Docket Nos. 74-1749, 74-1865, 74-1840 (2d Cir., Nov. 20, 1974). The courts have broad remedial powers to adjust their remedies so as to "make effective the right of recovery afforded" by the securities laws. *J. I. Case Co.* v. *Borak,* 377 U.S. at 433.

Indeed, CC's predicament is not unlike that of the plaintiff in *Gottlieb* v. *Sandia American Corp.,** where the plaintiff had become saddled with an unmarketable block of stock. Because computation of the value of the securi-

* 304 F. Supp. 980 (E.D. Pa. 1969), *aff'd in part, rev'd in part on other grounds,* 452 F.2d 510 (3rd Cir.), *cert. denied sub nom. Wechsler* v. *Gottlieb,* 404 U.S. 938 (1971).

ties would be near impossible, the Court did not hesitate to modify the traditional remedies of damages to effectuate the principles of *Borak*. It ordered the defendants to accept the plaintiff's stock at a price equivalent to his cost.

(2) As an alternative theory, CC is entitled to the difference between the value of its plurality position ($72 per share) and the highest price it could conceivably have obtained on a public offering. This requires assuming that the necessary audited financials could have been accelerated so that the offering could be effected by January. On that assumption, more favorable to defendants than the facts warrant, CC would by Wahrsager's computation have netted $27 a share. Wahrsager's pricing of this hypothetical public offering in January stands unassailable. On the public offering hypothesis, CC's damages would be $45 per share ($72 minus $27), and the loss from the subsequent decline in Piper's stock (to its present $10 a share) would fall on CC even though in fact it had no opportunity to sell.

(3) Assuming *arguendo* that the Court wishes to calculate damages on the basis of CC's actual average cost ($64 per share) rather than the value of its leading plurality position in a fair race ($72 per share), then it would have to deduct from CC's average cost per share ($64) the maximum conceivable amount that CC could have realized on a hypothetical public offering in January ($27 per share). This would produce damages of $37 per share.*

Accordingly, we submit that this Court should, in implementation of its earlier decision, award CC $45 a share, or at the very minimum $37 a share.

* Dr. Murray's and Rosenkranz's computation of damages, which began at a figure less than cost and made no computation of a premium for control, were in the same $37 range (EV 878, 908-09).

**Equitable relief**

The restraints on CC ordered by the District Court should be removed. BP should not be permitted to have *de facto* control. Conditions should be restored to a lawful *status quo* prior to defendants' violations. The only permissible restriction is that Piper not be merged into CC or any affiliate.

The injunction against BP's voting its 14½% illegal block should be substantia[illegible] than five years. Piper is in a cyclical business [illegible]ted by the depressed state of the economy an[illegible]ergy crisis (EV 1019). With the depression and energy shortage likely to continue, CC will work to bring Piper through five lean years, only to turn over the benefits to BP at the end of the cycle. Hence, CC should be given a reasonably longer period to manage Piper under effective control.

Since CC's interest is in maximizing the price of Piper shares, with a view towards the fateful day when BP will again have the power to merge, CC can be relied upon to use its power during the injunctive period to advance the interests of Piper and its public shareholders.

**The Court should award CC's actual interest cost and attorneys' fees.**

This Court authorized the District Court to award "additional appropriate relief as it may find necessary to implement our decision herein, after affording the parties an opportunity to be heard on the issue of relief" (480 F. 2d at 380). CC is entitled to the interest expense actually incurred in carrying its locked-in Piper investment and to its attorneys' fees in pursuing its own and the public's in-

terest in this litigation. The District Court rejected both claims.

**Carrying Charges on CC's Piper Investment.** CC's injury did not stop with the drastic devaluation of its Piper holdings upon being reduced to a permanent minority position. Since 1969, it has paid over $14,000,000 in interest on its Piper investment, with no dividend return at all (EV 893).

The District Court rejected CC's claim for reimbursement, stating that "[t]here has been no showing that CC has been 'locked in' so that sale of its Piper stock has been impossible" (2383A). This conclusion completely disregards the record. As noted before, the experts on both sides agreed that CC's minority shares could not, in fact, have been sold.

But even if the evidence that CC was locked into its Piper investment was not so overwhelming and unanimous, the burden of proving that CC could in fact have sold its shares surely had shifted to the defendants. *See Columbia Pictures Industries, Inc.* v. *American Broadcasting Cos.*, 501 F.2d 894 (2d Cir. 1974). Yet, defendants offered no evidence of any such prospect.

Accordingly, as a direct and foreseeable consequence of the defendants' illegal actions, CC has been burdened with interest charges of over $14 million on its Piper investment. If CC is to be made whole for its actual loss in this case, this interest expense must be reimbursed. Legal interest—presently 6%—on the amount to be awarded CC for the devaluation of its holding is simply not compensatory under the circumstances of this case.

**Attorneys' Fees.** In *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332, 344 n. 16 (2d Cir. 1974), this Court left open the question of whether a successful plaintiff in a private securities action could be awarded its attorneys' fees on a showing that the public interest had been promoted by its action.

The District Court rejected CC's claim for attorneys' fees, stating:

> "If anything is clear concerning this lengthy and bitterly fought litigation, it is that service of the public interest was not CC's motivation and any such service has been wholly incidental and has been amply satisfied by the damages awarded to CC." (2388-89A)

This District Court, we submit, misconceived the test: any private litigation, other than a champertous action, is intended to vindicate the rights of the plaintiff. The rationale for awarding attorneys' fees is that the action by the private litigant has also promoted the public interest in enforcement of the securities law. *See Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970); *SEC* v. *Capital Counselors, Inc.*, CCH Fed. Sec. L. Rep. ¶94,572 (S.D.N.Y., May 22, 1974).

In affording CC standing to sue, this Court recognized that actions of this nature served the public interest (480 F.2d at 356-57). Indeed, in denying the SEC an injunction against BP, this Court said that the relief sought by and to be awarded CC "largely achieved its [the SEC's] commendable purpose" and should be "more effective" than "a blanket injunction in deterring infraction of the law" (480 F.2d at 395, 406-07). Finally, the injunction to which the Court held CC was entitled against BP voting its

illegally-acquired shares should, if properly issued, benefit not only CC but Piper's remaining public shareholders, who also stand at the mercy of BP.

Few litigants have faced as many obstacles in vindicating the objectives of the securities laws as CC. If counsel fees are ever to be awarded to private litigants in securities cases, surely this is the case.

## Conclusion

The District Court's decision amounts to the proverbial 6¢ verdict in a case which cries out for damages equal to the injury.

—CC suffered a devaluation of at least $45 a share in its $44,000,000 Piper investment. The District Court awarded damages of only $2.40 a share.

—CC incurred over $14 million in interest charges on its frozen Piper investment during the pendency of this lawsuit. The District Court awarded interest of only $600,000.

—BP's illegal control of Piper has been legitimatized even during the injunction's term. Less than 5 years from now—no matter how depressed the economy may be—it will be able to consummate its merger with Piper.

—For all its violations, BP—by reason of the very mandate of this Court—has been relieved of its liability for the $13 million bonus to the Piper family. Its one-third pro rata share of the damages (80 cents per share) is less than a normal brokerage commission—a bargain price for the prize it illegally seized.

Never have perpetrators been as richly rewarded by a court for violating the law as defendants, or a victim as severely punished as CC.

This Court should reverse the decision below, and award CC damages of $45 a share, plus its actual interest incurred, and attorneys' fees. The injunction should be modified as requested herein.

Dated: January 3, 1975

Respectfully submitted,

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Attorney for ____________________

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Signed CHADBOURNE, PARKE, WHITESIDE & WOLFF

Attorney for Piper

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January 1975

Signed Sullivan & Cromwell

Attorney for First Boston